Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JOHN RATELLE, Acting warden of California State Prison at Lancaster, and DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

LEE PERRY FARMER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Can a criminal defense attorney's informed trial tactic deprive a defendant of his constitutional right to the effective assistance of counsel?

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION	1
CONSTITUTIONS, STATUTES OR REGULATIONS	1
OPINION OR JUDGMENT BELOW	4
STATEMENT OF THE CASE	4
CERTIORARI SHOULD BE GRANTED TO PREVENT COURTS FROM USING THE SIXTH AMENDMENT TO RESTRICT THE INFORMED TRIAL TACTICS OF CRIMINAL DEFENSE ATTORNEYS	6
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Cases	
McAleese v. Mazurkiewicz, 1 F.3d 159 (3d Cir. 1993)	6
Morgan v. Bunnell, 24 F.3d 49 (9th Cir. 1994)	6
People v. Farmer, 47 Cal. 3d 888 254 Cal. Rptr. 508 765 P.2d 940 (1989)	9
People v. Flores, 538 N.E.2d 481 (Ill. 1989)	6
People v. Kelly, 1 Cal. 4th 495 3 Cal. Rptr. 677 822 P.2d 385 (1992)	6
People v. Smith, 521 N.E.2d 688 82 N.Y.2d 731 (Court of Appeals of N.Y. 1993)	6
Sanders v. Trickey, 875 F.2d 205 (8th Cir. 1989)	6
Strickland v. Washington, 466 U.S. 668 80 L. E. 2d 674 104 S. Ct. 2052 (1984)	6

TABLE OF AUTHORITIES, CONT'D

U.S. v. Aiello,
900 F.2d 528 (2d Cir. 1990) 6

U.S. v. Miller,
643 F.2d 713 (10th Cir. 1980) 6

U.S. v. Hardin,
846 F.2d 1229 (9th Cir. 1988) 6

U.S. v. Hughes,
635 F.2d 449 (5th Cir. 1991) 6

Constitutional Provisions

United States Constitution
Fifth Amendment 8
Sixth Amendment 6

Statutes

California Evidence Code
§ 1200 8
§ 1202 8
§ 1230 8

California Penal Code
§ 32 8
§ 189 8

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C., § 2254 (1) Petitioners seek review of the memorandum decision of the United States Court of Appeals for the Ninth Circuit in Farmer v. Ratelle, No, 96-56489, reversing the district court's denial of Farmer's petition for writ of habeas corpus. The memorandum decision was filed November 21, 1997. The Court of Appeals denied Petitioners' petition for rehearing January 12, 1998.

CONSTITUTIONS, STATUTES OR REGULATIONS

Sixth Amendment to the United States Constitution. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

California Evidence Code Section 1200. (a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to proved the truth of the matter stated. (b) Except as provided by law, hearsay evidence is inadmissible. (c) This section shall be known and may be cited as the hearsay rule.

California Evidence Code Section 1202. Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had the opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant.

California Evidence Code Section 1230. Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that

a reasonable man in his position would not have made the statement unless he believed it to be true.

California Penal Code Section 31. WHO ARE PRINCIPALS. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.

California Penal Code Section 189. All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by an other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree. As used in this section, "destructive device" means any destructive device as defined in section 12301, and "explosive" means exposive as defined in section 12000 of the Health and Safety Code. To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

OPINION OR JUDGMENT BELOW

Farmer v. Ratelle, No. 96-56489.
Farmer v. Ratelle, SACV 94-697 GLT (Eex).
People v. Farmer, 47 Cal. 3d 888, 889-931, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).

STATEMENT OF THE CASE

The California Supreme Court affirmed Farmer's Riverside County convictions of first degree murder, two counts of first degree burglary, the special circumstance finding he committed the murder in the commission of first degree burglary, and enhancements for three prior prison terms, while reversing his death penalty for prosecutorial misconduct in the penalty phase argument. People v. Farmer, 47 Cal. 3d 888, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).

The guilt phase evidence circumstantially established Farmer shot and killed victim Erich Schmidt-Till while burglarizing his apartment. Farmer's defense was that his companion Charles Huffman was the shooter. Id., 899-900.

Following retrial of the penalty phase, a new jury decided on a life sentence without the possibility of parole rather than death.

In his new trial motion in Riverside County Superior Court, his automatic appeal in the California Supreme Court, his motion to dismiss the special circumstance in Riverside County Superior Court, and his habeas corpus petitions in the Riverside County Superior Court, the California Court of Appeal for the Fourth Appellate District, Division Two, the California Supreme Court, and the United States District Court for the

Central District of California, Farmer claimed his original trial attorney was constitutionally ineffective for not introducing in the guilt phase Charles Huffman's confession that he shot Erich Scmidt-Till.

Although the claim was rejected on the merits by all these courts the United States Court of Appeals agreed with Farmer, holding his original trial attorney's strategic decision deprived Farmer of his constitutional right to the effective assistance of counsel.

CERTIORARI SHOULD BE GRANTED TO PREVENT COURTS FROM USING THE SIXTH AMENDMENT TO RESTRICT THE INFORMED TRIAL TACTICS OF CRIMINAL DEFENSE ATTORNEYS

The Court of Appeals held trial counsel's tactical decision not to present Huffman's confession at the guilt phase deprived Farmer of his Sixth Amendment right to the effective assistance of counsel. Focusing on the powerful exculpatory nature of third party confessions, it carved out an exception to the rule that informed tactical decisions of trial counsel should not be second-guessed.

This Court should grant certiorari because the Court of Appeals thereby decided an important federal question -- the Sixth Amendment right to the effective assistance of counsel -- in a way that conflicts with decisions of this Court, federal Courts of Appeals, and state courts of last resort. See, e.g., Strickland v. Washington, 466 U.S. 668, 689-691, 80 L. E. 2d 674, 104 S. Ct. 2052 (1984), U.S. v. Miller, 643 F.2d 713, 714 (10th Cir. 1980), Morgan v. Bunnell, 24 F.3d 49, 52 (9th Cir. 1994), U.S. v. Hardin, 846 F.2d 1229, 1231-1232 (9th Cir. 1988), Sanders v. Trickey, 875 F.2d 205, 208 (8th Cir. 1989), U.S. v. Hughes, 635 F.2d 449, 453 (5th Cir. 1991), McAleese v. Mazurkiewicz, 1 F.3d 159, 166-176 (3d Cir. 1993), U.S. v. Aiello, 900 F.2d 528, 532-533 (2d Cir. 1990), People v. Kelly, 1 Cal. 4th 495, 523, 3 Cal. Rptr. 677, 822 P.2d 385 (1992), People v. Smith, 521 N.E.2d 688, 690, 82 N.Y.2d 731 (Court of Appeals of N.Y. 1993), and People v. Flores, 538 N.E.2d 481, 488 (Ill. 1989). Unless this Court grants certiorari, reviewing courts similarly misreading the Sixth Amendment will further restrict the tactical choices open to criminal defense attorneys.

This case shows the danger of such restrictions. Farmer's trial counsel Joseph Meyers tactically decided not to present possible testimony by Dorothy Hicks

Farmer that Charles Huffman confessed he was the one who shot Eric Schmidt-Till. Meyers made this decision because the prosecutor could impeach such testimony with Huffman's later statement to police detailing the underlying burglaries and naming Farmer as the shooter of Schmidt-Till. (Case No. 96-56489, Farmer's Supplemental Excerpt of Record.)

The state record showed the soundness of Meyers' tactical decision. Meyers knew Dorothy Hicks Farmer was a problematic witness regarding Farmer's guilt (Farmer's Excerpt of Record 134-135), as she revealed when she later testified in Farmer's penalty retrial. (RT 4072-4133.)

She was too nervous to come forward as a witness at the guilt phase. She was Farmer's girlfriend. She engaged in criminal activities with Farmer. She introduced Farmer to Lloyd Reed, the victim's roommate. She confirmed Farmer conducted many earlier drug transactions with Reed in the apartment. She confirmed Farmer was upset because Reed owed him drug money. She confirmed Farmer went to the apartment armed with a firearm on the night of the murder in order to "get blood or money."

She was originally charged in the case along with Farmer. She admittedly lied to police investigating the murder. She helped Farmer hide the murder weapon. She married Farmer so the prosecution could not call her as a prosecution witness. She was sleeping with Huffman when he allegedly boasted to her that he shot the victim.

Huffman's alleged confession to her physically contradicted evidence that Schmidt-Till was shot twice in the face and once below the chest and was alive for some time after the shooting.

Even had Meyers been able to force Dorothy Hicks Farmer to testify, her bias and involvement in the criminal activities surrounding the murder undermined her credibility. She confirmed Farmer was the one who had

drug dealings with Lloyd Reed and was therefore the shooter identified by Schmidt-Till in his dying declaration. She established Farmer's motivation to commit the underlying burglaries. Even had the jury believed Huffman was the shooter, her testimony would have assured Farmer's conviction of the burglaries and of first degree felony-murder as an aider and abettor. Cal. Penal Code, §§ 32, 189. The mistaken identity defense pursued by Meyers, without any impeached testimony from Dorothy Hicks Farmer, sought appellant's acquittal of these charges.

The Court of Appeals nevertheless maintained Meyers could have corroborated Dorothy Hicks Farmer's testimony with his own testimony about confessions Huffman made to him after Huffman was acquitted of the murder in a separate trial. Again, however, several problems confronted such testimony.

The testimony was inadmissible hearsay. Cal. Evid. Code, § 1200. Even though Huffman reneged on his agreement to testify for Farmer by taking the Fifth Amendment, he was not making an admissible declaration against his penal interest when he confessed to Meyers because he had been acquitted of the murder of Schmidt-Till. Cal. Evid. Code, § 1230. Meyers' testimony was only admissible to rebut Huffman's statement to police that Farmer was the shooter, a statement Meyers wanted to keep away from the guilt phase jury because it detailed the underlying burglaries and named Farmer as the shooter. Cal. Evid. Code, § 1202. (Original RT 2907-2911, 3639, 3910-3919; Penalty retrial CT 715; Farmer's Excerpt of the Record 133-135.)

Huffman's confessions to Meyers were not credible. Huffman and Farmer were cellmates throughout their trials. They agreed Huffman would testify for Farmer once Huffman's trial was over. Huffman sat by throughout his own trial while the murder was described in detail and while both the prosecutor and Huffman's

own attorney described Farmer as the shooter. Huffman sat by while his wife Victoria testified that Farmer confessed to being the shooter. Only after Huffman was acquitted of Schmidt-Till's murder did Huffman's attorney allow Meyers to talk to Huffman. (Original RT 977, 3942-3947, 3939; Retrial RT 2816-2819, 2824-2825, 2836-2837, 3368-3369, 3419-3420, 4255, 4265, 4268, 4270, 416-4419, 4480.)

Although Huffman was still trying to reduce his burglary sentence when he talked to police, he had little to lose by falsely confessing to Meyers. On the other hand fingering Farmer as the shooter when he talked to police gave Huffman an undesirable "snitch jacket" as a prisoner. (Original RT 3949.) Faced with Huffman's contradictory statements, the jury would not be inclined to credit his confessions.

Ironically, the original verdict of death confirms the soundness of Meyers' guilt phase strategy not to present Huffman's dubious confessions at the guilt phase and so avoid guilt phase impeachment with Huffman's statement to police.

After the original jury found Farmer guilty of the underlying charges and special circumstances Meyers decided he had nothing to lose by presenting Huffman's confessions at the penalty phase. He could find no one other than himself willing to testify about Huffman's alleged confessions. He testified about Huffman's confessions and was impeached with Huffman's later police statement. The prosecutor argued to the jury that Huffman was lying when he confessed to Meyers. The same jury that convicted Farmer of the crimes and special circumstance returned a verdict of death after considering Huffman's confessions to Meyers impeached by Huffman's later police statement. (Original RT 3908-3909, 4013-4054, 4097, 4215, 4220, 4223-4225.) People v. Farmer, 47 Cal. 3d 888, 917, 254 Cal. Rptr. 508, 765 P.2d 940 (1989).

The Court of Appeals' mistaken assumption that third party confessions should always be introduced restricts the tactical choices open to criminal defense attorneys at trial. The Court of Appeal's mistake is highlighted by the dubious value of Huffman's confessions available to Meyers at the guilt phase when compared with the resulting impeachment undermining Farmer's guilt phase defense to the underlying charges of burglary and first degree felony-murder.

CONCLUSION

This Court noted strategic choices made after a thorough investigation are "virtually" unchallengeable. Strickland v. Washington, 466 U.S. 692. Notwithstanding this language, the Court of Appeals' memorandum decision signals a dangerous trend toward second-guessing informed tactical trial decisions. Because future opinions of this kind will severely restrict the options available to criminal defense attorneys, this Court should grant certiorari. It should plainly state that regardless of the broad category of evidence at issue, an informed tactical choice whether or not to present that evidence at trial does not violate the Sixth Amendment.

Eliminating the qualification, "virtually," will insure the independence of trial counsel while still preserving the Sixth Amendment right to be represented by counsel.

Dated: March 4, 1998.

Respectfully submitted,

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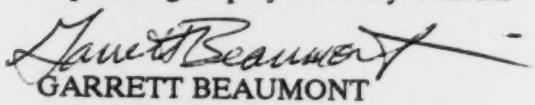

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